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5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**
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8 ANTHONY M. POSEY,

9 *Petitioner,*

10 vs.

11 SHERIFF DOUG GILLESPIE, *et al.,*

12 *Respondents.*
13

2:12-cv-00313-JCM-VCF

ORDER

14 This habeas matter under 28 U.S.C. § 2241, in which petitioner seeks federal pretrial
15 intervention in a pending state criminal proceeding, comes before the court on petitioner's
16 application (#8) for a certificate of appealability.

17 Although the court did not provide a disposition as to a certificate of appealability in its
18 order of dismissal, it would appear that a certificate of appealability is a prerequisite for an
19 appeal when an inmate or detainee in state custody seeks relief under § 2241. *See, e.g.,*
20 *Wilson v. Belleque*, 554 F.3d 816, 824-25 (9th Cir. 2009).

21 When the district court denies a habeas petition on procedural grounds without
22 reaching the underlying constitutional claims, the petitioner must show, in order to obtain a
23 certificate of appealability: (1) that jurists of reason would find it debatable whether the petition
24 stated a valid claim of a denial of a constitutional right; and (2) that jurists of reason would find
25 it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*,
26 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000). While both showings
27 must be made, "a court may find that it can dispose of the application in a fair and prompt
28 manner if it proceeds first to resolve the issue whose answer is more apparent from the

1 record and arguments." 529 U.S. at 485, 120 S.Ct. at 1604. Where a plain procedural bar
2 is properly invoked, an appeal is not warranted. 529 U.S. at 484, 120 S.Ct. at 1604.

3 In the present case, jurists of reason would not find it debatable whether the district
4 court was correct in its dismissal of the handwritten petition without prejudice to the filing of
5 a new petition in a new action instead on the required form. The court's local rule LSR 3-1
6 requires that a habeas petition must be filed on the court's required form, in this instance an
7 AO-242 form for a § 2241 petition. The court directed the clerk to provide petitioner such a
8 form and dismissed the current action without prejudice. Such dismissal is not tantamount
9 to a with-prejudice dismissal given that petitioner has not been convicted in the pending state
10 criminal proceedings, such that the federal limitation period has not even begun to run.

11 Petitioner urges in his application that his constitutional rights allegedly are being
12 violated in the pending state criminal proceedings and that the state courts have not granted
13 him relief. However, even assuming *arguendo*, that petitioner were to present a viable basis
14 for federal pretrial intervention in the pending state criminal proceedings, which *arguendo*
15 assumption is a highly dubious one,¹ petitioner still must present a petition on the required
16 form. Petitioner's application ignores the purely procedural basis for the dismissal without
17 prejudice to the filing of a new petition in a new action on the proper form.

18 The court accordingly will deny a certificate of appealability.

19 Further, the court, pursuant to 28 U.S.C. § 1915(a)(3), certifies to the court of appeals
20 that the appeal is not taken in good faith. An appeal of a dismissal without prejudice to the
21 filing of a new petition on the proper form in a new action – with no accompanying adverse
22 limitation period consequences – is frivolous such that an appeal would be dismissed in the
23 case of a non-indigent litigant.

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27 ¹As the court noted in passing in a footnote in the order of dismissal, petitioner's attempt to recast his
28 claims as a violation of double jeopardy would appear to be frivolous on its face. See #2, at 2 n.1. In all
events, however, petitioner – in the first instance – must present his petition on the proper form as required by
the court's local rule.

1 IT THEREFORE IS ORDERED that petitioner's application (#8) for a certificate of
2 appealability is DENIED.

3 IT FURTHER IS ORDERED that the court further certifies to the court of appeals that
4 the appeal is not taken in good faith.

5 The clerk shall reflect both dispositions prominently in the docket entry for this order
6 and shall forward same to the court of appeals in the customary practice, which may include
7 by notice of electronic filing.

8 DATED April 11, 2012.

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12 JAMES C. MAHAN
13 United States District Judge
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